



# Western States Water

## Addressing Water Needs and Strategies for a Sustainable Future

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### **WESTERN GOVERNORS/CONGRESS/ENERGY** **Hydropower Policy Modernization Act of 2017**

On May 1, Western Governors' Association (WGA) Executive Director James Ogsbury wrote Rep. Greg Walden (R-OR), Chair, House Committee on Energy and Commerce, and Rep. Frank Pallone (D-NJ), Ranking Member, regarding provisions in proposed legislation (which has yet to be introduced and given a bill number). WGA's position (2015-08) referring to hydropower states: "Congress and the Administration should authorize and implement appropriate hydropower projects and programs through efficient permitting processes that enhance renewable electric generation capacity and promote economic development, while ensuring protection of important environmental resources and indigenous people's rights." The letter declares, "States are vested with primary authority to manage water within their borders, and they have the authority to develop, use, control and distribute water resources within their boundaries.... Western Governors are concerned about provisions in Section 34 ("Hydropower Licensing and Process Improvement") of the proposed Hydropower Policy Modernization Act of 2017. Portions of the language included in the published discussion draft of this proposal are identical to language of Subtitle B, 'Hydropower Regulatory Modernization' of the proposed North American Energy Security and Infrastructure Act of 2015 (H.R. 8)."

On July 18, 2016, Governor Steve Bullock and Governor Dennis Daugaard wrote the Committee, expressing the Western Governors' concerns over the language in H.R. 8 that would have designated the Federal Energy Regulatory Commission (FERC) as the lead agency for "all hydropower authorizations, approvals, and requirements mandated by federal law, including hydropower facility licenses and amendments, as well as all permits, special use authorizations, certifications, and opinions." The Governors requested that this language be removed or amended so that existing state hydropower licensing authorities are not replaced, or in anyway impeded, by FERC jurisdiction. Similarly, now, Western Governors request that the language in Section 34 of the proposed Hydropower

Policy Modernization Act of 2017 be removed or amended so states' authorities are not usurped by FERC.

The 2016 letter stated, "We understand that members of the hydropower industry have expressed concern that state licensing processes generally, and state water quality certifications under section 401 of the Clean Water Act specifically, can be overly time-consuming. It is crucial, however, that state water quality certifications and other necessary state procedures be undertaken in a careful, deliberate manner. Hydropower licenses may have a term in excess of 50 years, and those rights granted in a hydropower license directly affect the quality and quantity of state water, state wildlife and other resources. We note also that western states have taken proactive steps to reduce hydropower licensing and relicensing timelines and initiated programs that increase intra-state agency coordination and coordination between states, project proponents and federal partners. These efforts have proven effective at reducing licensing and relicensing timelines, while also ensuring protection of water and other state resources."

### **LITIGATION** **Corps/Water Supply**

On February 1, the Cobb County-Marietta Water Authority (CCMWA) filed suit against the U.S. Army Corps of Engineers, *Cobb County-Marietta Water Authority v. U.S. Army Corps of Engineers* (U.S. District Court, Northern District of Georgia, 1:17-cv-400), alleging that the Corps' adoption of its own federal water allocation rule is an unlawful attempt to override the State of Georgia's water allocation authority in violation of the 10th Amendment. On April 28, the Corps filed its Answer in response, largely denying CCMWA's characterization of the Storage Accounting System and other documents that speak for themselves. The Corps also raised the defenses that the court may lack subject matter jurisdiction, and that the court may not be able to grant the relief requested by CCMWA, even if the court finds that the Corps has violated federal statutory provisions.

According to the Complaint, CCMWA entered a contract with the Corps in 1963 giving it the right to store 13,140 acre-feet of water in Allatoona Lake. Subject to

Georgia regulation, CCMWA has the right to store water, which the state allocated by permit, in the storage space CCMWA purchased. The Georgia permit includes the exclusive right to impound and withdraw man-made inflows into the lake, including (1) reclaimed water returned to the reservoir, and (2) water released from a CCMWA-owned water supply reservoir upstream, which flows through the natural river channel to be withdrawn through CCMWA's existing lake intake structure. CCMWA states that it invested hundreds of millions of dollars to generate these "made inflows."

The Corps has rejected Georgia's allocation, adopting instead its own federal "Storage Accounting System," which would allow the Corps to allocate to itself almost 95% of the CCMWA inflows. According to CCMWA, the Corps' position effectively treats these inflows as the property of the federal government, subject to allocation by the Corps, simply because they entered the federal facility. The CCMWA requests a review of the Corps' Storage Accounting System under the Administrative Procedures Act. CCMWA also alleges violations of the National Environmental Policy Act for failure to complete an Environmental Assessment or Environmental Impact Statement associated with its decision to adopt and implement the Storage Accounting System.

### **Clean Water Act/WOTUS/NAM v. Dept. of Defense**

On April 27, several briefs were submitted to the Supreme Court in *National Association of Manufacturers (NAM) v. Department of Defense*, including NAM's opening brief and a supporting amicus brief from 30 states. The parties request a reversal of the 6th Circuit's decision that it has subject matter jurisdiction over the consolidated petitions. The briefs argue that the federal rule redefining the Waters of the United States (WOTUS) does not fall within the exclusive, original jurisdiction of the circuit courts of appeals under 33 U.S.C. §1369(b)(1), because the rule does not fit within one of the seven actions listed for judicial review. They oppose the federal argument that policy concerns for judicial efficiency should grant immediate appellate jurisdiction, noting the wisdom in allowing difficult issues to mature through full consideration by different courts. NAM pointed out that, "Stretching the text of §1369(b) past its breaking point to increase efficiency undermines the very purpose of the [law]."

### **WATER RESOURCES Texas/Stormwater/ARS**

On April 3, Texas State Representative Lyle Larson introduced a bill (H.B. 3991) to appropriate excess flows in abnormally wet years for use in aquifer storage and recovery (ASR) projects. The bill proposes to amend the Texas Water Code (TWC) to remove permitting

barriers to maximize beneficial use of state water for ASR projects. The changes would allow ASR permits for water that may only be available on a periodic basis, such as when the water supply exceeds the amount needed to fulfill senior water rights and environmental flow standards, or would otherwise flow into the Gulf of Mexico. The State Natural Resources Committee unanimously reported the bill favorably without amendment, and on May 8, placed it on the general legislative calendar.

The bill would authorize the Texas Commission on Environmental Quality (TCEQ) to amend existing water rights to be diverted to ASR projects rather than tied to on- and off-channel reservoirs. TCEQ could issue these water rights amendments, as long as the diversion amount, rate, and point of diversion are not changed, without an opportunity for notice or a contested case hearing. TCEQ could also amend water rights to account for evaporation credits, allowing a water right holder to increase the diversion amount or diversion rates to the ASR project by converting a portion of their storage appropriation, subject to notice and hearing. The proposed TWC amendments would require that the new water rights not interfere with existing water rights, TCEQ's adopted environmental flow standards, or water accounting and water master operations on the Rio Grande.

### **PEOPLE**

On April 10, Oklahoma Governor Mary Fallin named Julie Cunningham, Executive Director, Oklahoma Water Resources Board to the WSWC. We congratulate Julie on her appointment and look forward to working with her (See WSW #2236).

### **WESTERN STATES WATER COUNCIL/MEETINGS Summer Meetings - Rohnert Park, California**

The WSWC Summer (184<sup>th</sup>) Council Meetings will be held in Rohnert Park, California on June 27-29, 2017. Our California hosts have arranged a full-day field trip for Council members and guests on Tuesday, June 27. For further information please see: <http://www.westernstateswater.org/wswc-summer-184th-council-meetings-ca/>.

#### **Schedule of Meetings**

#### **Tuesday, June 27**

8:00 am Field Trip

#### **Wednesday, June 28**

9:15 am Water Resources Committee  
11:45 am Executive Committee (over lunch)  
1:30 pm Water Quality Committee  
3:45 pm Legal Committee  
6:00 pm WSWC Reception

#### **Thursday, June 29**

8:00 am Full Council Meeting

**The WESTERN STATES WATER COUNCIL is an organization of representatives appointed by the Governors of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.**